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## Estate Planning Series

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### LIVING WILLS IN NEW JERSEY

A Living Will, which is legally known as an “**Advanced Directive**” has become an essential element in estate planning. A Living Will permits an individual to communicate, in advance, the medical care decisions he or she would make if rendered incapacitated and designates a person to make healthcare decisions on his/her behalf. The importance of a properly drafted Living Will can be seen when you view the consequences of not having a Living Will.

Several years ago, a nationwide controversy occurred in Florida regarding a person who did not possess a Living Will. In that situation, the husband and parents fought for years over who had the right to make healthcare decisions for the incapacitated person. If there had been a Living Will, there would have never been a controversy, as the Living Will would have designated a person to make the healthcare decisions. Since there was no Living Will, the husband and parents were each able to argue that they had the power to make healthcare decisions.

A Living Will can be **Self Directive**, **Proxy Directive** or both. In most situations, we recommend that the Living Will be both Self Directive and Proxy Directive. A Self Directive provides instructions and directions regarding health care in the event a person lacks decision-making capacity. The Self Directive may state a person’s general treatment philosophy and objections together with the person’s specific wishes regarding the provision, withholding or withdrawal of any form of health care, including life-sustaining treatment. A Proxy Directive is a form of Power of Attorney. It appoints a “Health Care Representative” or “Attorney-in-Fact” to make health care decisions in the event a person at a subsequent date loses the capacity to make such decisions.

Any competent adult may be appointed as a “**Health Care Representative**”. Once a person’s attending physician determines that a person lacks decision - making capacity, the “Health Care Representative” has the authority to make health care decisions on behalf of the patient. The “Health Care Representative” steps into the individual’s shoes and makes the health care decisions that the patient would have made had he or she possessed decision-making capacity, or where the patient’s wishes cannot be determined adequately, to make a decision in the best interest of the patient.

In carrying out the person’s wishes, the “Health Care Representative” is to give priority to that person’s Self Directive, if one exists. The Living Will statute in New Jersey covering Proxy Directives also specifically protects the patient’s “Health Care Representative” from liability. The law states that the “Health Care Representative” is not imposed with any liability

for any portion of the person's health care costs, and is not subject to criminal or civil liability for any action performed in good faith and in accordance with the provisions of the act to carry out the terms of the Advance Directive. New Jersey law also expressly states that a Living Will should not be interpreted to impair the obligations of health care professionals to provide for the care and comfort and to alleviate a patient's pain, in accordance with accepted medical and nursing standards.

If the patient lacks decision-making capacity, but nonetheless clearly expresses the wish that medically appropriate measures be utilized to sustain life, that wish shall take precedence over any contrary decision of the "Health Care Representative" and over any contrary statement in the patient's Advanced Directive. Also, if the patient who is determined to lack decision making capacity is subsequently found to possess adequate decision-making capacity, the patient shall retain legal authority to make the health care decision.

To be sure that a Living Will conforms to New Jersey legal guidelines and that the patient's wishes in the event of incapacity are clearly expressed, it is important to consult a lawyer experienced in Estate Planning before the occasion arises in which the Advanced Directive is needed.



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